B. FLETCHER, Senior Circuit Judge, dissenting:

I respectfully dissent.

The petitioner, Donald Warren, caused a traffic accident that claimed the lives of three people and disabled another. Mr. Warren, a Vietnam veteran who suffers from post-traumatic stress disorder, had been drinking heavily on the night of the accident. He pled guilty to three counts of manslaughter and one count of aggravated assault. The state court judge sentenced him to thirty-six years in prison.

At the time of the change of plea and sentencing hearings, there were obvious signals that should have prompted an inquiry into Mr. Warren's competency. To begin, the petitioner's medical records reveal a panoply of psychiatric problems. Mr. Warren had suffered for decades from a "severe case of post-traumatic stress disorder" as a result of his military service in Vietnam; according to the Veteran's Administration, this affliction rendered Mr. Warren "permanently disabled." Following his arrest, Mr. Warren suffered from auditory hallucinations and expressed suicidal thoughts. While incarcerated, he was placed on a suicide watch, and was subjected by prison authorities to "four-point" treatment in which a patient's limbs are all pinned in order to prevent the patient

from harming himself or others. The petitioner's doctors described him as suffering from "feelings of persecution," as having "paranoid traits," and as demonstrating "schizoid features." One of these doctors opined that Mr. Warren was insane at the time of the accident.

Likewise, the state's doctors concluded that Mr. Warren suffered from "extreme psychosocial stress," observed that he may have had organic brain damage, and found that he was dependent on numerous substances, including alcohol, to ameliorate depression and psychosis. These doctors diagnosed Mr. Warren with "mixed personality disorder with schizoid, antisocial, dependent, and passive-aggressive characteristics." One of the state's doctors – who has since had his medical license revoked – opined that Mr. Warren was both sane at the time of the accident and competent to stand trial, but this evaluation took place nearly a year prior to Mr. Warren's decision to plead guilty. Indeed, at the sentencing hearing the government's psychiatrists specifically indicated that they had *not* looked at the issue of competency and had not "asked the detailed questions" that would have been necessary for a competency determination. When he entered his guilty plea, Mr. Warren was taking four psychotropic medications – two for depression, one for anxiety, and one for hallucinations. The medical records indicate that some of these medications had the potential to affect Mr. Warren's cognitive abilities.

In addition to these medical materials, which obviously raise the specter of incompetence, there is ample evidence to confirm that Mr. Warren actually had difficulty appreciating the nature of his decision to plead guilty. Mr. Warren's trial attorney indicated that most of his ostensible consultations with Mr. Warren were in fact consultations with Mrs. Warren, the petitioner's wife, since Mr. Warren was frequently unable to comprehend the nature of the legal proceedings or appreciate the legal advice given to him. Further, Mr. Warren's confusion was apparent at the change of plea hearing. When asked whether he intended to plead guilty, Mr. Warren responded, "I think so." When asked whether he understood the plea agreement, Mr. Warren responded, "I'm a little confused." Only after consulting with his lawyer in the middle of the hearing did he answer both questions affirmatively. Then, at the conclusion of the hearing, Mr. Warren asked his wife, "What was that all about?" – a comment that, according to Mrs. Warren, she later relayed to defense counsel.[1]

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[1] The majority argues that Mr. Warren "successfully resolved his uncertainty" at the change of plea hearing by "conferring with counsel." There is, of course, no record of Mr. Warren's conversation with counsel, and the only indication that his confusion was "successfully resolved" is the fact that Mr. Warren did an immediate about-face and indicated that he both understood the plea agreement and intended to enter into it. The record, however, belies any purported successful resolution, for Mr. Warren asked his wife immediately following the hearing what the hearing was "all about." The majority ignores this evidence by questioning its veracity and suggesting that Mr. Warren's statement "could have been a dismissive, pejorative reference to the proceedings." In doing so, the

In my view, these facts entitle Mr. Warren to habeas relief on two grounds. First, there was a violation of Mr. Warren's right to due process under the Fourteenth Amendment because the trial court judge failed to conduct a competency hearing *sua sponte*. In *Pate v. Robinson*, 383 U.S. 375 (1966), the Supreme Court held that a trial court must conduct a competency hearing if there is a "bona fide doubt" about the competency of the defendant to stand trial or enter a guilty plea. *Id.* at 385. The majority loses sight of the proper inquiry here, which "is *not* whether he was competent, but whether he was entitled to a hearing to determine his competence." *Torres v. Prunty*, 223 F.3d 1103, 1106 (9th Cir. 2000) (emphasis added). Mr. Warren was entitled to a hearing if there was *doubt* about whether he had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him." *Id.* (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam)). In my view, it was unreasonable for the trial court to proceed with the change of plea hearing, given that the heavily medicated defendant had a history of psychiatric problems and obviously had been

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majority distorts the record by taking Mr. Warren's statement out of context and giving it an unnatural reading. Viewed in light of Mr. Warren's regimen of psychotropic drugs, his suicide attempts, and his evident confusion during the hearing, it is not credible for the majority to claim that Mr. Warren's statement was anything other than an expression of bewilderment.

befuddled by straightforward questions about whether he understood and intended to enter the plea.

Second, there was a violation of Mr. Warren's right to effective assistance of counsel under the Sixth Amendment because Mr. Warren's attorney failed to request a competency hearing. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court held that a criminal defendant is denied his Sixth Amendment right to counsel if his attorney's performance falls below "an objective standard of reasonableness" and "prejudices" the defendant. *Id.* at 689, 692. Here, defense counsel provided constitutionally deficient assistance when he neglected to request a competency hearing, given that he had previously provided notice of an insanity defense on behalf of his client, had been forced to communicate with his client's wife because of the client's psychological problems, had obtained a plethora of evidence calling into question his client's mental health, and had learned from Mrs. Warren that her husband had not understood the nature of the change of plea hearing.

The majority observes that trial counsel initially pursued an insanity defense and then "concentrated on attempting to obtain a court order for Warren's psychiatric treatment, in view of Warren's mental disability due to post-traumatic stress disorder." Apparently, the majority considers this trial strategy deserving of deference under *Strickland*. I do not. While the abandoned insanity defense

related to Mr. Warren's capacity at the time of the accident to understand right from wrong, it has little bearing on his capacity to confer with his attorney or to understand the consequences of his plea. The question of competency involves a determination about whether the defendant had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him." *Torres*, 223 F.3d at 1106 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam)). In my view, the fact that the attorney noticed an insanity defense and then pursued psychiatric treatment for his client is yet more proof that he should have had his client's competency examined, not an indication of sound legal strategy. Given all of the red flags raised in this case – Mr. Warren's treatment with psychiatric drugs, his suicidal episodes during incarceration, his expressed confusion at the plea hearing, and the attorney's consultations with Mr. Warren's wife – it was incumbent upon Mr. Warren's attorney to investigate his client's competency.

On this record, I find astonishing the majority's assertion that "it was not ineffective assistance of counsel to . . . advise Warren to enter the plea agreement and plead no contest without first requesting a competency hearing." Nor can I concur with the majority's statement that "[t]he evidence before the state trial court was insufficient to create a good faith doubt as to Warren's competency." Here,

both the defense attorney and the trial court moved ahead with criminal proceedings against a defendant who was at the very least psychologically infirm and was perhaps unable to appreciate at all the consequences of his decision to enter a guilty plea. The majority's incantation of the AEDPA standard of review is also unpersuasive, as the proceedings against Mr. Warren were clearly "contrary to, or . . . an unreasonable application of" the Supreme Court's long-established rulings in *Pate* and *Strickland*. 28 U.S.C. § 2254(d).

In my view, Mr. Warren has set forth two claims that each independently entitle him to habeas relief.[2] I therefore dissent.

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[2] The only other obstacle to Mr. Warren's habeas petition is the fact that he missed the one-year filing deadline under AEDPA. *See* 28 U.S.C. § 2244(d)(1). The majority avoids the question of whether equitable tolling is appropriate in this case. I would reach the question and resolve it in petitioner's favor, as the district court did, because of the unique difficulties of dealing with the petitioner's mental incapacity in the course of preparing the habeas petition. *See Stillman v. LaMarque*, 319 F.3d 1199, 1202-03 (9th Cir. 2003); *Green v. White*, 223 F.3d 1001, 1003-04 (9th Cir. 2000) *Calderon v. U.S. Dist. Ct.* (*Kelly*), 163 F.3d 530, 541 (9th Cir. 1998) (en banc); *Calderon v. U.S. Dist. Ct.* (*Beeler*), 128 F.3d 1283, 1288 (9th Cir. 1997).